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CHARLES ELMORE CROP

In The

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, APPELLEE.

CHARLES C. TRABUE,
Counsel for Appellee.

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Of Counsel.

BAIRD-WARD—NASHVILLE

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May it Please the Court:

Appellant, the complainant below, comes to this Court to complain of the application to this case of chapter 80 of the Tennessee Public Acts of 1929, on the ground that it impairs contract rights of complainant.

The answer to this is, as we shall undertake to show, that complainant itself applied the 1929 Act to this case, that it sued on a statutory bond given pursuant to that Act and recovered on the bond and received and appropriated the proceeds, to-wit, $40,000; and that therefore the applicability of the 1929 Act to this case was not and could not be a determinative question.

Also we shall undertake to show that the Act of 1929 was and is applicable to the case in any event.

I.

Complainant cannot be heard to complain of the Act because it sued and recovered on it in this case.

No question is made of the *right and power* of the legislature to enact the law. The sole complaint is that it cannot be applied to *this* case because it would impair complainant's contract rights.

But complainant (the appellant here) itself applied the Act to this case. *It sued and recovered on the Act.* Thus in its brief in this court (p. 4) it is stated that complainant sued on a refunding bond given "pursuant to a *subsequent* statute known as chapter 80 of the Acts of 1929," and that "judgment was entered against this latter refunding bond for the amount of its bond." And then in its petition for appeal (R., 10) complainant says that the question it seeks to make in this court is as to "the constitutional validity of . . . chapter 80 of the 1929 Public Acts of Tennessee"—*the same Act upon which it had sued and recovered.*

These facts are not only conspicuous in the record but are *found and recited in the opinion of the Supreme Court,* which states that complainant had filed its claim with the Highway Commissioner "according to subsection (e) of section 1, chapter 80, of the Acts of 1929," and that complainant had sued on the bond given pursuant to that Act, and that *it had recovered on that bond and received from it $40,000.00.* (R., 1-3.)

And while the Tennessee Supreme Court does not comment on the legal effect of complainant's suing and recovering on the Act complained of, that effect necessarily follows from the facts. Indisputably, as we will show, the question in the case from the beginning was not whether the Act of 1929 was applicable—for that Act was invoked and brought into the case by complainant—but was as to the interpretation of the Act.

This court has often said that for the purpose of ascertaining whether there was a proper federal question in a case coming up from a state court it would determine for itself whether non-federal grounds of the decision below were substantial. *Ward* v. *Love County*, 253 U. S., 17, 22, 64 L. Ed., 751, 758; *Schuylkill Trust Co.* v. *Pennsylvania*, Adv. Opin. Vol. 80, L. Ed., No. 1, p. 115.

And for the same reason it is submitted that a litigant who on his own showing has sued on a statute and received its benefits will not be heard in this court to complain that the statute impairs his contract rights.

The facts briefly are these: On March 12, 1928, the Commissioner of Highways of Tennessee entered into a contract with the National Construction Company to build a certain bridge across the Tennessee River. The law then governing the matter was chapter 74 of the Acts of 1917. Pursuant to that Act the National Construction Company gave to the Commissioner a bond to guarantee the performance of the contract and payment for work and labor. Appellee (National Surety Company) became the surety on that bond, which, because it was given for the performance of the contract, we call the contract bond.

Also the Act of 1917 required the Commissioner to hold back for certain purposes part of the contract price accruing under highway contracts, called retainage.

After this particular contract was made and the contract bond executed there was enacted chapter 80 of the Acts of 1929, which among other things authorized the Commissioner at the completion of the contract to turn over the retainage to the contractor on his executing a proper refunding bond. This was done in the instant case, so that *there was both a contract bond* (on which appellee was surety) *and a refunding bond* with another surety. The substantial terms of the two Acts are set out in the Appendix to complainant's brief in this court.

Complainant was a subcontractor and had a claim, and it brought this suit against the contractor and *on both bonds.* (R., 13.)

As to the refunding bond the bill averred (R., 16):

> "Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eight-two cents ($77,069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee *a Refunding Bond, as provided by law,* with the defendant Equitable Casualty & Surety Company, as surety thereon, in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways and Public Works paid over said retained funds to the principal contractor and *now holds said Refunding Bond for the benefit of claimants* who had filed their claims with said Department of Highways & Public Works."

The "Refunding Bond as provided by law" on which complainant was thus suing was the refunding bond provided for *by chapter 80 of the Acts of 1929, the Act that complainant is here complaining of.* This refunding bond recited (R., 20): "This obligation is executed under the provisions of chapter 80, Acts of 1929 . . ."

Accordingly complainant in the Chancery Court invoked the Act of 1929 specifically and sued on the bond given pursuant to it as a bond "provided by law."

The answer to the bill of the contract surety (this appellee) stated (R., 32):

> "It is insisted that the release of said retainage and *the acceptance of said refunding bond necessarily released and relieved this defendant* of any liability to

> the Department of Highways and Public Works. . . . It is further insisted that the release of said retainage and the acceptance of said refunding bond necessarily released and relieved this defendant of any and all liability to each and every claimant included in said refunding bond, one of which was the complainant herein."

So that the question, as stated, was one of *interpretation* and not of constitutional law—of the interpretation of an act that complainant had sued upon.

The refunding bond was sufficient to cover all claims but the refunding surety became insolvent while the case was in the Chancery Court and another refunding surety was substituted in the amount of $40,000. Complainant asked for judgment on the original refunding bond and then on the substitute refunding bond, and *it was given judgment and the $40,000 was paid into court and was applied on complainant's claim.* (R., 16, 40.)

This left an unpaid balance. The contract surety (this appellee) had insisted in its answer quoted above that the paying over of the retainage and taking of a refunding bond pursuant to the Act of 1929 had the effect of discharging the contract bond. The question was not whether the Act of 1929 was applicable—its applicability was a substantive basis of complainant's suit—but was solely with respect to the meaning of the Act.

The Chancellor *construed* the Act as intending that the claimant could look to *both bonds,* and he therefore rendered judgment against the contract surety for the claim less the amount paid by the refunding surety.

The contract surety (this appellee) then appealed from the Chancery Court to the Tennessee Court of Appeals. That court reversed the decision on the ground that the payment over of the retainage under the Act of 1929 *so impaired the rights of the contract surety* as to effect its

discharge. (R., 67.) That was when and where the contract clause of the constitution *first came into the case. No one had invoked that clause. And it was applied not in complainant's favor but in the contract surety's favor.*

Both complainant and the contract surety then filed petitions for *certiorari* in the Tennessee Supreme Court. The contract surety in its assignments of error *insisted on its contention made in the Chancery Court,* namely, that the intention of the 1929 Act was that on payment of the retainage and taking a refunding bond the contract bond should stand discharged. (R., 68.) *The complainant disputed this contention.* Its sole assignment of error was (R., 69):

> "The Court of Appeals erred in holding that the action of the Commissioner of Highways and Public Works in payment over to the National Construction Company the retained funds aggregating $77,069.82 on September 3, 1930, and taking a refunding bond *released and discharged* the National Surety Company as a general surety on said contractor's bond for all liability thereunder to furnishers of material and labor used in the building of said bridge, and in reversing the judgment of the Chancellor and dismissing the suit as to the defendant National Surety Company."

This was the issue in the Supreme Court, one solely of interpretation. The contract clause was not invoked in the assignments. There was no constitutional question.

It does not appear from the record here how the constitutional question came into the case on complainant's behalf. Plainly it was not from the pleadings or assignments of error. It may be presumed, therefore, that it arose in the briefs or argument in the Supreme Court. The Chancellor had interpreted the Act as intending that both bonds should be liable. The Supreme Court reached a different conclusion. That court settled in this case and lawfully settled the *interpretation* that the payment over of the re-

tainage and the taking of a refunding bond pursuant to the Act of 1929 discharges the contract bond. (R., 4.)

No one disputes that interpretation or disputes the fact that it was a determination solely within the right of the Supreme Court of Tennessee and did not involve any federal question.

After interpreting the Act the Supreme Court went on to express the opinion that the Act related to the remedy; and that is the basis and the only basis for claiming a federal question.

That was not a determinative question and could not be made so. Complainant had not assailed the Act but had invoked it. *It could not recover on the Act and at the same time attack it.* And the record affirmatively shows that the only issue made in the pleadings and assignments of error was with respect to the interpretation of the Act.

It might be immaterial whether complainant, suing on the refunding bond taken under the 1929 Act, alleged that it was a lawful bond or an unlawful one. As a matter of fact, as heretofore pointed out, complainant sued on it as a bond properly and lawfully taken—"as provided by law." (R., 16,)

It is an elementary principle that one who claims the benefit of a statute cannot at the same time assail it. 6 R. C. L., p. 95; 12 C. J., 769; *Collier* v. *Montgomery County,* 103 Tenn., 714.

So in *Roberts* v. *Roane County,* 160 Tenn., 124, the Court approved the following language from Cooley Const. Lim.:

> "There are cases when a law in its application to particular facts must be sustained, because the party who makes objection *has by prior acts precluded himself from being heard against it;* and when a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for

him to waive protection and to consent to such action as would be invalid if taken against his will."

This principle was very sharply called to complainant's attention in the Chancery Court.

Under the Act of 1917 the Commissioner of Highways was to retain a certain part of the contract price until all claims were paid. The 1929 Act authorized the surrender of this retainage to the contractor on his giving a refunding bond. At the final hearing complainant asked to amend its bill so as to require the Commissioner of Highways to pay this money into court, and the Chancellor refused this application, stating in his decree (R., pp. 36-7):

"The complainant in its original bill alleged in substance that the Refunding Bond for the retainage *was executed 'as provided by law'* and the Department of Highways and Public Works held it for the benefit of claimants who had filed their claims with the Department of Highways and Public Works, and *prayed for a decree against the principal and the surety on the Refunding Bond* for the amount claimed to be due the complainant. The proposed amendment calls for the payment of the retainage into court by the Commissioner of Highways and Public Works. The complainant having sued on the bond and thereby treated it as a valid obligation, subjecting the principal and surety thereon to the demands of complainant in a direct suit on the bond, cannot by an amendment allege that it is the duty of the defendant, R. H. Baker, Commissioner of Highways and Public Works, to pay the retainage into court for which the bond was executed.

"Where it is alleged that the bond was taken as provided by law and the complainant has brought action thereon against the principal and surety, it cannot, after the case has gone to trial, change its position by asserting as set forth in the proposed amendment that it is the duty of the Commissioner of Highways and

> Public Works to pay the retainage into court. *The amendment is inconsistent and repugnant to the original bill* and the application to amend the original bill as proposed, is denied." (Italics Ours.)

The Supreme Court stated definitely its conclusion that the taking down of the retainage would release the contract surety, viz:

> "It must have been contemplated that the release of the retainage by the Highway Commissioner either under (a) or under (b) [referring to the provisions of the Act]—the retainage being adequate to cover litigated claims—would discharge the surety on the contract bond from liability to laborers and materialmen; otherwise the validity of (a) and (b) could scarcely be sustained," etc. (R., 4.)

It may, perhaps, be urged that complainant accepted and adopted the Act of 1929 in so far as it authorized substituting a refunding bond for the retainage (that was specifically called to complainant's attention in the ruling by the Chancellor set out above), but that complainant cannot be held to have accepted the Act of 1929 in so far as it had the effect of releasing the contract surety. If such a distinction could be made, complainant would still be in the position of having assented to the release of the retainage, and, if it would be no further bound by the Act of 1929, its consent to the release of the retainage disentitled it to hold the contract surety. That is the plain purport of the language of the Tennessee Supreme Court quoted above.

However, the position is not tenable that complainant might be bound by the Act in part and not in whole. *When complainant invoked the Act it was in the same situation as a claimant whose rights arose after the Act.* Such claimant would not know in advance what the court's interpretation of the two acts would be but he would nevertheless be bound by that interpretation. Complainant might have had the right to make the question of impairment *if*

the 1929 Act was being imposed on it against its will. But when it invoked the Act and sued on the bond issued pursuant to it, and when the contract surety in its answer took the position that this would effect its discharge, and when complainant elected nevertheless to proceed against the refunding bond, it must be held to have accepted the Act of 1929 with all of its attributes and results.

Judge McKinney in his dissenting opinion (R., 8) agrees that the Act of 1929 is valid, but holds that it cannot apply to this particular contract because this contract and the contract bond were entered into before the passage of the Act. *But if the Act does not apply it does not belong in this case at all. And yet it is in this case and was brought into the case by complainant.* It has been given the effect in this case of substituting for the retainage the refunding bond, and complainant *has assented to this effect* by abandoning the retainage and suing and recovering on the refunding bond.

And if procedure under the Act of 1929 be given *the further effect* by the Supreme Court of discharging the contract bond, that is a mere matter of the interpretation of an act which complainant has adopted and availed itself of. And where complainant has thus committed itself to an act and received the benefits of it, it cannot complain thereafter when it discovers that the act also imposes some disadvantages.

In the opposing brief it is said (p. 17):

> "*It being conceded by all parties* that the effect of the subsequent enactment, chapter 80 of the 1929 Public Acts of Tennessee, was to release and discharge the contractual obligation of the National Surety Company as surety without the consent of the obligee, it is submitted that the subsequent enactment violates the applicable provisions of the Constitution of the United States and is, therefore, void."

And yet with that knowledge or presumed knowledge ("conceded," as counsel say) complainant, far from repudiating the applicability of the 1929 Act, sued on it and recovered—at the same time being warned by the answer of the contract surety and by the Chancellor that the 1929 Act would deprive complainant of rights under the 1917 Act.

And also in the opposing brief it is said (pp. 17-18):

> "He [the Highway Commissioner] could not take a refunding bond nor could he destroy the materialman's rights to have these funds [the retainage] subjected to the payment of his claim."

But complainant sued and recovered *on the very refunding bond that it undertakes to say in this court the Highway Commissioner "could not take."* It was a bond given under the 1929 Act that complainant here seeks to repudiate. And complainant sued on it as a bond given "as provided by law."

It is respectfully submitted that an examination of the opinion in the light of the record will conclusively show that the determinative question was as to the interpretation of the 1929 Act, and that complainant, having invoked that Act and sought and obtained a recovery under that Act, cannot be heard to say that it impaired his rights.

II.

The 1929 Act was in any Event Applicable to this Case.

The Chief Justice of the Tennessee Supreme Court granted the appeal to this court. But that court was of opinion that no federal constitutional question was involved. The opinion, which was written by the Chief Justice, states that (R., 5):

". . . our construction of chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty,"

The bond given under the 1917 Act was a statutory bond. It was made to the State as obligee, and while it was also available to materialmen, their rights depended entirely on the statute.

The court said that it had previously held in *Southern Construction Co.* v. *Halliburton,* 149 Tenn., 319, 332—

"That the statutes requiring contractors on public works to execute bonds for the protection of laborers and materialmen had the same general purpose as the mechanic's lien statutes. The beneficiaries of the legislation are given a lien under private contracts, recourse on the bond under public contracts."

This was, we submit, a question of statutory construction that was wholly within the determination of the Supreme Court of Tennessee. That court is presumed to know the history and purpose of Tennessee legislation, and its ruling that the intention of the Act was that this statutory bond should have the same qualities and incidents as a mechanic's lien was one within its right and power to make. And the court went on to say (R., 5):

"Many cases hold that a mechanic's lien, being only a remedy afforded by statute for the collection of a debt arising out of contract, and not a vested right, may be abolished or modified by statute without impairing the obligation of the contract. *Bangor* v. *Goding,* 35 Me. 73, 56 Am. Dec. 688; *Hanes* v. *Wadey,* 73 Mich., 178, 2 LRA 498; *Bolton* v. *Johns,* 5 Pa. St., 145, 47 Am. Dec., 404; *Wilson* v. *Simon,* 91 Md., 1, 80 Am. St. Rep., 427."

So it is said in 17 RCL, p. 600:

"A lien given by statute for the payment of a debt is but a part of the remedy afforded by law for its col-

lection, and is subject to legislative control, and may be changed, or taken away completely, without in any wise interfering with or impairing the obligation of contracts."

The court said, however, that it was not necessary in this case to consider whether the remedy could be wholly abolished, since it was clearly within the power of the legislature to substitute a different remedy. As to this the court said (R., 6):

> "It is the general rule that where a statute deals with procedure only, it applies *prima facie* to rights of action that have accrued and, indeed, to pending actions. Lewis' Sutherland Statutory Construction, 2 ed. Vol. 2, p. 1226, 25 RCL, 791, 59 CJ, 1173.
>
> "The constitutional rights of one whose existing remedy is thus taken away are not infringed if the procedural statute provides him a new and effective ground instead. This is true even though the new remedy is not so convenient."

In support of this principle the court quoted from Tennessee cases and also cited *Tennessee* v. *Sneed*, 96 U. S., 69, and *Fourth National Bank* v. *Francklyn*, 120 U. S., 764.

The court stated its conclusion as to this aspect of the case as follows (R., 5):

> "If we concede that the materialmen's lien in the one instance or his recourse on the bond in the other instance enters into his contract and is a part thereof, and that a remedy so embraced cannot be impaired without impairing the obligation of the contract, still our construction of chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty. We construe the statute as regulating, after its passage, *the procedure* to be followed by all parties in respect to the final settlement of every highway contract, whether the contract itself was made before or after the enactment of chapter 80 of the Acts of 1929."

And after reviewing the two acts to show that they were in their nature procedural, the court added (R., 6):

> "Chapter 80 of the Acts of 1929 thus interpreted is retrospective only in the sense that it may be said to have altered the remedies previously existing for enforcing rights arising under earlier contracts. On its face the statute is retrospective to that extent."

And the court then states its finding that the substitute remedy is a fair and adequate one, as follows (R., 7):

> "It seems to us the substitute remedy was adequate and effectual, as well as conventional. We suppose that statutes exist everywhere to permit the release of property taken under the levy of an execution or attachment upon the execution of a good bond by the property owner. We have not heard the validity of such statutes questioned. We see no impropriety therefore in a statute permitting the general contractor to secure the release of his retainage upon the execution of a good bond.
>
> "Likewise the substitution of the refunding or indemnity bond for the contract bond seems unobjectionable. In either case, the bond would have to be approved by the Highway Commission. The protection offered by one bond would ordinarily be as good as the protection offered by the other. As a rule, bonds from surety companies are taken."

We have undertaken, largely by quotations from the opinion, to show the reasoning of the Tennessee Supreme Court on which its conclusion was based. The court construed the Tennessee statutes in the respect here under consideration as relating to procedural remedies, for which therefore the state could validly substitute other remedies.

The bond here was a statutory bond. It was made to the state, and the materialmen had nothing to do with its procurement or with the selection of the surety or with the payment of the premium. The state procured it as a guar-

antee of the performance of the contract and also to provide a remedy to the materialmen, who, because this was a public work, could not have recourse to the mechanic's lien laws.

It is said in complainant's brief (p. 14) that the court had in previous cases held that materialmen had contract rights in such a bond. The court had held that they could sue on such a bond, but the question had not arisen before of whether they had contract rights in the constitutional sense. Indeed, no cases are cited in the opposing brief holding that this Tennessee statute or that similar statutes elsewhere confer such contract rights.

This was the first occasion that the court had had to consider the question in this aspect, and, as shown above, the court construed the statute as providing a remedy for which the legislature could substitute another remedy without bringing the statute "into any constitutional difficulty."

The Supreme Court of Tennessee has interpreted the Act of 1917 as determining the procedure in the settlement of highway contracts, and the Act of 1929 as more fully regulating that procedure. It has determined that the procedure under the earlier Act provided a certain remedy which would be available to materialmen, and that the later Act provided that in certain circumstances—that is, where the retainage was taken down and a refunding bond executed—the recourse of the materialmen should be against this substituted bond. And it has determined that since both Acts in this regard related to remedial procedure the later Act was applicable to all contracts that had not been settled.

This is not a matter of construing a bond but of construing a statute; for the bond is a statutory bond and will have only the qualities and effect intended by the statute, and the statute is *sui generis*.

While it is true that in a case involving the question of whether an Act impairs the obligation of a contract this court will not be bound by the interpretation of the state court, yet it has said that it will follow and adopt that interpretation unless it is pretty manifestly wrong. The court stated the rule in this respect in *Millsaps College* v. *Jackson*, 275 U. S., 179, 72 L. Ed., 196, as follows:

> "While in cases like this 'we form our own judgment as to the existence and construction of the alleged contract and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed unless it seems to be plainly erroneous.'"

It is submitted that for the foregoing reasons the Act of 1929 was properly applicable to the determination of this case.

Respectfully submitted:

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